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AUTHOR Zirkel, Perry A.; Smith, Margaret D.
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ABSTRACT

An increasing amount of case law dealing with collective bargaining in education was evident in 1987. The more than 100 cases cited indicate that educational employers and their unionized employees are increasingly resorting to the courts rather than resolving issues at the negotiation or arbitration table. However, there were no United States Supreme Court decisions dealing with collective bargaining in education this year. Across the country the courts applied legal principles long recognized in the field of labor relations. The review addresses the following issues: (1) constitutional issues; (2) recognition and representation; (3) rights and obligations of exclusive bargaining representatives; (4) scope of bargaining; (5) grievability and arbitrability; (6) judicial review of arbitration awards and employment relations board rulings; (7) strikes and other job actions; and (8) other miscellaneous decisions arising from labor disputes. (MLF)

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BARGAINING

Perry A. Zirkel and Margaret D. Smith

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INTRODUCTION

An increased amount of case law dealing with collective bargaining in education was evident in 1987; this year's caseload was the largest to

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date. Apparently, educational employers and their unionized employees are increasingly resorting to the courts rather than resolving issues at the negotiation or arbitration table. However, there were no United States Supreme Court decisions dealing with collective bargaining in education this year. Nor were there any surprises in terms of doctrinal development. Across the country the courts applied legal principles long recognized in the field of labor relations.

CONSTITUTIONAL ISSUES

In 1987 state and federal constitutional issues arose in several cases related to collective bargaining. A state constitutional issue was presented in Florida when a teachers' union challenged an annual reward of $3,000 provided under a statewide master teacher program, claiming that the payment abridged its collective bargaining rights guaranteed under the Florida Constitution. The Supreme Court of Florida held that the $3,000 was not a "wage" subject to bargaining and, therefore, that the master teacher program did not infringe upon the union's state constitutional collective bargaining rights.[1]

Alleging violation of both the federal and state constitutions, a teacher in Michigan brought an action against the school district and her union, claiming, in addition to state statutory violations, a denial of due process. Specifically, she argued that she had a constitutionally protected right in her previously accrued seniority that could not be taken away, under a new collective bargaining agreement provision that only gave her partial seniority credit for her maternity leaves, without due process under the Michigan and federal Constitutions. Finding that she had merely a unilateral expectation, rather than a legitimate entitlement, that her previously accrued seniority would remain untouched by the new collective bargaining agreement, the court ruled that she had no constitutionally protected property right under the expired agreement.[2] Key to the court's conclusion was the rule, under Michigan precedents, that a bargaining representative may in negotiations with the employer modify or abrogate seniority rights accrued by the members of the previous collective contracts.

The constitutionality of agency shop fees continued, in 1987, to be a subject of litigation. In one case, the Second Circuit Court of Appeals upheld the constitutionality of fee-collection procedures that utilized

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1. United Teachers of Dade v. Dade County School Bd., 500 So. 2d 508 (Fla. 1986).
2. Carlson v. North Dearborn Heights Bd. of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987). The teacher also alleged sex discrimination and breach of duty of fair representation, both under state statutes.

the American Arbitration Association to arbitrate nonmember fee disputes[3] finding the Connecticut Education Association in compliance with the guidelines set forth under the Supreme Court's 1986 decision in *Chicago Teachers Union v. Hudson*.[4]

In two other such cases, the courts declined to decide the constitutional claims. In the first case, the federal district court refused to issue a preliminary injunction sought by nonunion teachers who alleged federal and state constitutional violations, including violation of their rights of expression and association, due process, and equal protection, regarding their "fair share" portion of collective bargaining costs.[5] The district court declined to determine the constitutional issues on the grounds of *Pullman*-type abstention, because the concurrent proceeding pending before the Wisconsin Employment Relations Commission would likely resolve the matter based on state legislation.

In the second such case, the union successfully sued in state court to collect fair-share representation fees from nonunion teachers. The teachers then brought a suit in federal court challenging the constitutionality of the collective bargaining provision that provided for the fair-share fees. The federal court abstained from exercising its jurisdiction, concluding that the state court action, from which there already had been a judgment, could adequately have protected the teachers' federal constitutional rights and that the federal suit might merely have been a method to collaterally attack the final state court judgment.[6]

Recognition and Representation Issues

Unit Determination

Supervisory, Managerial, and Confidential Employees. Only three cases in 1987 dealt with the status of supervisory, managerial, or confidential employees. In a New Hampshire case, principals had voted to be represented by the same union as the teachers whom they supervised. The state supreme court held that under state statute such representation was prohibited in light of potential conflicts of interest, but that the principals were free to choose any other bargaining representative.[7] Somewhat similarly, supervisors in Los Angeles sought to form a bargaining unit that was affiliated with the same international union as was the unit for the employees whom they supervised. Finding

3. Andrews v. Education Ass'n of Cheshire, 653 F. Supp. 1373 (D. Conn. 1987).
4. 444 U.S. 1066 (1986).
5. Jordi v. Sauk Prairie School Bd., 651 F. Supp. 1566 (W.D. Wis. 1987). For another case in which a constitutional issue arose, see *infra* note 129 and accompanying text.
6. Oliver v. Fort Wayne Educ. Ass'n, 820 F.2d 913 (7th Cir. 1987).
7. *In re* Manchester Bd. of School Comm., 523 A.2d 114 (N.H 1987).

that, because of their affiliation with the same international union, the two units would really be members of the same employee organization, the court ruled that the supervisors' unit was not appropriate.[8]

In contrast, the third case dealt with faculty members in higher education. The National Labor Relations Board had certified the American Association of University Professors as the bargaining representative of the faculty at Boston University. After bargaining requests were rejected by the University, the Association filed unfair labor charges. Ruling that its "judicial hands are tied by *Yeshiva*,"[9] the First Circuit Court of Appeals held that these full-time faculty members were managerial employees. Inasmuch as the faculty members were thereby excluded from coverage of the National Labor Relations Act, the unfair labor practice charges in the case were dismissed.[10]

Other Representation and Recognition Issues. A few cases in 1987 dealt with assorted other representation and recognition issues. In a school district in Iowa, a group of nonprofessional employees sought to join a bargaining unit previously composed entirely of professional employees, including teachers and counselors.[11] The Supreme Court of Iowa affirmed the decision of the state's Public Employment Relations Board that there was a sufficient "community of interest" between the professional and nonprofessional employees to support including both in one bargaining unit.

Similarly, Pennsylvania's intermediate appellate court upheld the inclusion of licensed practical nurse instructors in a previously certified professional bargaining unit of teachers, finding the requisite shared "community of interest" between the groups.[12]

In contrast, Minnesota's intermediate appellate court ruled that master's degree students who taught in a school district as "teaching fellows" for one year as part of their degree programs were not public employees and, therefore, were not eligible to be included in the school district teachers' bargaining unit.[13]

The two other representation cases were decided in Indiana. In one case the representation issue arose directly. An educational association sought to represent teachers in three separate school corporations. The

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8. Los Angeles Unified School Dist. v. Public Employment Relations Bd., 237 Cal. Rptr. 278 (Ct. App. 1986).

9. National Labor Relations Bd. v. Yeshiva Univ., 444 U.S. 672 (1980).

10. Boston Univ. Chapter, Am. Ass'n of Univ. Professors v. National Labor Relations Bd., 835 F.2d 399 (1st Cir. 1987).

11. Anthon-Oto Community School Dist. v. PERB, 404 N.W.2d 140 (Iowa 1987).

12. Chester Upland School Dist. v. Pennsylvania Labor Relations Bd., 532 A.2d 925 (Pa. Commw. Ct. 1987).

13. Rochester Educ. Ass'n v. Independent School Dist., 415 N.W.2d 743 (Minn. Ct. App. 1987).

Indiana Education Employment Relations Board interpreted the state's teacher-board collective bargaining act to prohibit a teachers' organization from doing so, but the intermediate court of appeals reversed, finding no language in the statute that limited a teachers' union to a single school corporation for its membership.[14]

In the other Indiana case, representation arose as an indirect issue secondary to, but determinative of, grievability. A school district in Indiana contracted with a public special education cooperative, or intermediate unit, to provide the district with special education teachers. These teachers then sought additional pay through the grievance procedure established between the school district and its teachers' union. The state court of appeals ruled that the school district was not required to proceed with the grievance, because the special education teachers belonged to the bargaining unit of the special education cooperative, and, therefore, were not represented by the school employee organization with whom the school district was obligated to bargain.[15]

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

Union Rights

Agency shop cases are covered in the "Constitutional Issues" section above; the only other union rights case concerned dues deduction. This case arose in Illinois when a successor union sued a school district for failing to remit dues to the new union in compliance with a check-off arrangement authorized by state statute. The board had been confused as to whom and where to send the dues and had advised union members to forward dues to the union of their choice for a short period of time. Subsequently, the board honored the dues check-off privilege to the successor union. Illinois' intermediate appellate court held that the district's temporary refusal to remit dues to the successor union under those circumstances was not improper.[16]

Obligations of Exclusive Representatives

Unions not only have certain rights as the exclusive bargaining

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14. DeKalb County Eastern Community School Dist. v. DeKalb County Eastern Educ. Ass'n, 513 N.E.2d 189 (Ind. Ct. App. 1987).

15. Northwest Indiana Educ. Ass'n v. School City of Hobart, 503 N.W.2d 920 (Ind. Ct. App. 1987).

16. Local 253, Div. Affiliated with Local 50 v. Illinois Educ. Labor Relations Bd., 512 N.E.2d 1008 (Ill. App. Ct. 1987).

agent; they also have certain obligations. The primary obligation, from a litigation perspective, is the duty of fair representation (DFR).

In three 1987 cases school employees were unsuccessful in their DFR suits against their respective unions. In the first such case a principal, representing herself in a *pro se* action, claimed that the union had failed to provide her with legal representation during her termination proceeding. The court ruled against her, finding that neither the list of benefits given to the principal when the union solicited her membership, nor a limited oral agreement between the principal and her union, imposed a duty on the union to provide the principal with complete legal representation.[17] In the second case a teacher was also unsuccessful in her claim that the union failed to fairly represent her. The court noted that to substantiate her claim the teacher would have to demonstrate bad faith, arbitrariness, or discrimination on the part of the union. The court found that the union's decision not to further pursue the teacher's claim was based on an assessment of the merits of the claim, not on an improper disregard of the teachers' rights.[18] In the third case, again a *pro se* action, a New York appellate court upheld a lower court's dismissal of the teacher's claims against her union, finding that the union's conduct was not arbitrary, capricious, discriminatory, or in bad faith.[19] The union staff had met with the teacher in an attempt to resolve issues concerning her initial claims and had even arranged for representation by an outside attorney prior to concluding that her claims were not meritorious.

Conversely, in a fourth case a teacher was partially successful in her DFR claim against a union, insofar as the appellate court reversed a lower court's summary judgment against her.[20] Although the teacher in question was not a member of the union, the union was still required to represent all employees in the unit. The court ruled that her claim was at least arguably meritorious; the issue of whether the representative breached its duty of fair representation by refusing in bad faith to pursue her grievance was a question of fact, precluding summary judgment.

Two other cases involved the statute of limitations applicable in DFR suits. A Michigan appellate court held that a teacher's DFR claim against the union was barred by a six-month statute of limitations under the state's Public Employment Relations Act.[21] In contrast, in two New

17. McCutcheon v. Chicago Principals Ass'n, 513 N.E.2d 55 (Ill. App. Ct. 1987).
18. Margolin v. Newman, 520 N.Y.S.2d 226 (App. Div. 1987).
19. Clissuras v. City of New York, 517 N.Y.S.2d 39 (App. Div. 1987).
20. Zimmerman v. Foundation of the French Int'l School, 830 F.2d 1316 (4th Cir. 1987).
21. Carlson v. North Dearborn Heights Board of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987). For another issue in this case, see *supra* text accompanying note 2.

York cases the courts applied a six-year general statute of limitations for breach of contract actions rather than a ninety-day limit for proceedings to vacate an arbitration award or a four-month period established by the PERB for filing unfair labor claims.[22] In the second of the New York cases the court also ruled that the employee's resignation from her job did not absolve the union of its duty to fairly represent her.[23]

Other DFR suits were disposed of on jurisdictional grounds. In a Michigan case, the defendant-union bargained away a grandfather clause, which had exempted plaintiff-teachers from paying the agency-shop fee. When the plaintiffs successively filed an unfair labor practice charge with the Michigan Employment Relations Commission and a DFR suit in the state trial court, the appellate court ruled that the trial court should dismiss the suit because the charge before the Commission involved the same claim and parties.[24]

In the Pennsylvania case a teacher brought an action against her union for failing to represent her during negotiations with her employer. Pennsylvania's intermediate appellate court dismissed the suit, concluding that the allegations concerned an unfair labor practice and, as such, fell within the exclusive jurisdiction of the state labor relations board.[25]

In an unusual case, members of a union in New York brought an action to require the union's newspaper to publish a paid advertisement that responded to the actions of Albert Shanker, the president of the American Federation of Teachers (AFT). Mr. Shanker had signed an advertisement in the *New York Times* which urged support of the contras in Nicaragua and which identified him as the president of AFT. The union newspaper rejected plaintiffs' attempted ad, which took the opposing viewpoint to Shanker's, based on its policy of not accepting political advertisements. Plaintiffs predicated their right to relief on a provision of the federal Labor-Management Reporting and Disclosure Act that provides for freedom of speech of union members. The federal district court dismissed the suit, ruling that the plaintiffs had failed to allege any interference with speech protected by the statute and that, even if one were to assume arguendo that the Shanker ad expressed political views attributable to the union, the union's policy was reasonably based on its need to avoid internal division and was fairly applied by offering to publish plaintiffs' ad free as a letter to the editor.[26]

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22. Hoerger v. Board of Educ., 514 N.Y.S.2d 395 (App. Div. 1987); Baker v. Board of West Irondequoit Cent. School Dist., 520 N.Y.S.2d 538 (App. Div. 1987).

23. 520 N.Y.S.2d at 543.

24. Cosgrove v. Lansing Bd. of Educ., 416 N.W.2d 316 (Mich. Ct. App. 1987).

25. Segilia v. Riverside School Serv. Personnel Ass'n, 526 A.2d 832 (Pa. Commw. Ct. 1987).

26. Roman v. New York State United Teachers, 655 F. Supp. 422 (S.D.N.Y. 1987).

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

Several cases dealt with whether various issues fell within the mandatory scope of collective bargaining. Two of them reflected opposite conclusions with regard to the subject of teacher evaluation. Iowa's supreme court held that under the applicable state statute not only grievances but also evaluation procedures constituted mandatory subjects of bargaining.[27] The court ruled that the union's remediation proposal, which required the district to identify teacher problems and offer suggestions for improvement, was part of the evaluation procedures and, therefore, was a mandatory subject except for the part that required the building principal to perform the evaluations, which the parties agreed at oral argument was a permissive subject. Conversely, Connecticut's highest court reached the opposite result, interpreting the state's Teacher Evaluation Act, which authorizes the addition of "other guidelines as may be established by mutual agreement between the . . . board of education and the teachers' [organization]," as intending evaluation to be a permissive, not mandatory, subject of bargaining.[28]

Two Michigan cases added to the list of mandatory topics of bargaining in that state. The intermediate appeals court held that both subcontracting special education services to an intermediate school district[29] and increasing the number of assigned daily class periods for high school teachers[30] were mandatory bargaining topics. The former case is currently on appeal.

In other cases, however, the same Michigan court ruled that two other issues were not mandatory subjects of collective bargaining. In the first case, the reorganization decision to eliminate teaching positions and assign those duties to a new community school director was determined to be within the scope of management prerogatives and, therefore, to not be a mandatory subject of bargaining.[31] Likewise, budgetary layoffs at a community college were determined to be within the managerial rights of the college.[32] While the impact of those layoffs on

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27. Northeast Community School Dist. v. Public Employment Relations Bd., 408 N.W.2d 46 (Iowa 1987).

28. Wethersfield Bd. of Educ. v. Connecticut Bd. of Labor Relations, 519 A.2d 41 (Conn. 1986).

29. Bay City Educ. Ass'n v. Bay City Pub. Schools, 397 N.W.2d 219 (Mich. Ct. App. 1986), *appeal granted*, 402 N.W.2d 468 (Mich. 1987).

30. Kent County Educ. Ass'n v. Cedar Springs Pub. Schools, 403 N.W.2d 494 (Mich. Ct. App. 1987).

31. United Teachers of Flint v. Flint School Dist., 404 N.W.2d 637 (Mich. Ct. App. 1986).

32. Schoolcraft College Ass'n of Office Personnel v. Schoolcraft Community College, 401 N.W.2d 915 (Mich. Ct. App. 1986).

the remaining employees would be a mandatory subject of bargaining, in this case the court found the impact to be *de minimus*.

Permissive Topics of Bargaining

In addition to the aforementioned Connecticut case concerning teacher evaluation, only two cases focused on permissive topics of bargaining. In Minnesota an industrial arts teacher was placed on unrequested leave of absence as the school district's response to declining enrollments and curriculum changes. The appellate court held that while Minnesota statutes only required a license for a teacher to be certified, it was permissible for the parties to have negotiated additional requirements as to teacher qualifications.[33] Since the teacher did not have the additional qualifications for other positions that were included in the collective bargaining agreement, he had been properly placed on unrequested leave.

In New York a school district attempted to stay the arbitration of a grievance that challenged its termination of a school bus driver. The district alleged that its power to terminate employees was nondelegable. The court held that although the school district could have retained this power, it may voluntarily bargain and agree to procedures and programs governing the exercise of that power.[34]

Prohibited Topics of Bargaining

In addition to the aforementioned Michigan decisions, courts identified some other prohibited subjects of collective bargaining in 1987 cases. In Maryland the state court of appeals held that matters of educational policy, the school calendar, and job classification were not subject to collective bargaining.[35]

In a specialized case applicable to the Department of Defense Dependents Schools (DoDDS), the D.C. Circuit Court held that the following topics were nonnegotiable under the Federal Service Labor-Management Act: a proposal that would provide benefits to DoDDS employees released from duty without pay to represent the recognized union; a proposal that would prohibit the use of any record not accessible to the employee from being used adversely against the employee; a proposal that would prevent DoDDS from delegating the supervision of the employees to the personnel of the host military departments;

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33. *In re* Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987).

34. Sweet Home Cent. School Dist. v. Sweet Home Serv. Employees Ass'n, 522 N.Y.S.2d 58 (App. Div. 1987).

35. Montgomery County Educ. Ass'n v. Board of Educ., 534 A.2d 980 (Md. Ct. App. 1987).

proposals that would require DoDDS to give union representatives, who are not DoDDS employees, documents requesting use of military facilities and services overseas, reimburseable government travel orders, and access to DoD services and facilities outside the U.S.; and a proposal to provide DoDDS employees with on-site telephones for their use.[36]

GRIEVABILITY AND ARBITRABILITY

Presumption and Arbitrability

Although there is a general judicial presumption favoring arbitrability, the five cases in 1987 were exceptions or contradictions to the rule. In New York a union sought arbitration of an alleged violation of a community college's procedure for reviewing allegations of sexual harassment and discrimination. The appellate court upheld the lower court ruling that the claim was not subject to arbitration, because said procedure was not incorporated or made part of the collective bargaining agreement.[37] Interestingly, the court put the burden on the union to show a valid and specific agreement evidencing a mutual intent to bargain such claims, thus apparently reversing or at least reducing the general pro-arbitrability presumption.[38]

More clearly following the contractual scope criterion, a California appellate court vacated an arbitration award based on a finding that the collective bargaining agreement did not address the subject issue of reduction in hours and wages or that of improper terminations.[39] Without such coverage, the arbitrator was without power to award a teacher the relief she sought.

Fitting in the same pattern was a Michigan case in which a teacher had made statements to the president of the board of education regarding possible illegal activities of certain school employees. After making those statements the teacher had been suspended and threatened with discharge. The teacher then sought injunctive relief and damages through the courts, claiming that his activities were protected by the state's Whistleblowers' Protection Act. The trial court granted summary judgment to the employer because the teacher had not exhausted the grievance remedies provided in the collective bargaining agreement. The state court of appeals reversed, finding that the employer had no

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36. Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 827 F.2d 814 (D.C. Cir. 1987).

37. County of Rockland v. Rockland County Unit of Rockland Community College Fed'n of Teachers, 509 N.Y.S.2d 608 (App. Div. 1986).

38. For a New York case illustrating the contrasting issue of procedural arbitrability, see *infra* note 51.

39. Marshall v. Russo, 242 Cal. Rptr. 657 (Ct. App. 1987).

right to arbitrate that particular dispute, because the issue was not one that arose under the terms of the collective bargaining contract.[40]

Other exceptions to the presumption were illustrated by cases in New York and Minnesota. In the New York case, the court upheld a stay of arbitration involving a teacher who had failed to receive certification, because the matter had already been resolved by litigation.[41] In the Minnesota case, the appellate court upheld the nonarbitrability of a former bus driver's grievance, because the bus driver was an at-will employee and not a member of the bus drivers' association.[42] Inasmuch as he was not a party to the contract between the school district and the association, his grievance was nonarbitrable.

Who Determines?

In the category of "Who Determines" the arbitrability issue, there are three separate possibilities as to the proper choice of a forum: the arbitrator, the public employment relations board, or the court. The first option was illustrated by two cases. In an Ohio case a board of education sought to intercede in the courts in a matter proceeding through arbitration. The court held that it did not have jurisdiction in the matter; once the arbitration procedure had been invoked the arbitrator had exclusive jurisdiction over the subject matter.[43] Only after the arbitration process was complete, the court clarified, could it become involved in a matter that was subject to arbitration. Somewhat similarly, in the New York case, the appellate court ruled that the grievance procedure provided in a collective bargaining agreement between a university and adjunct faculty members was the exclusive remedy available to the teacher.[44]

Two Illinois cases illustrated the third option. In one of these cases, the appellate court upheld a trial court's injunction preventing both an arbitrator and the Illinois Educational Relations Board from determining arbitrability, holding that the state's circuit court retained jurisdiction to decide arbitrability of disputes under collective bargaining.[45] In the other case, the same appellate court adhered to the rule that while they may not weigh the merits of a dispute, the courts generally will initially

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40. Tuttle v. Bloomfield Hills School Dist., 402 N.W.2d 54 (Mich. Ct. App. 1986).

41. Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).

42. Envall v. Independent School Dist. No. 704, 399 N.W.2d 593 (Minn. Ct. App. 1987). For other nonarbitrability rulings, see the "Management Prerogatives" section *infra*.

43. Pike-Delta-York Bd. of Educ. v. Pike-Delta-York Educ. Ass'n, 508 N.E.2d 678 (Ohio C.P. 1987).

44. Post-Adjunct Faculty Ass'n v. Board of Trustees, 511 N.Y.S.2d 874 (App. Div. 1987).

45. Board of Educ. v. Warren Township High School Fed'n of Teachers, 515 N.E.2d 131 (Ill. App. Ct. 1987).

determine substantive arbitrability of grievances except when parties mutually agree to allow the arbitrator to make that initial determination.[46]

Procedural Issues

The types of procedural issues that the courts addressed in 1987 varied. Several cases illustrate that the exhaustion doctrine may be seen as a procedural problem of sequencing. In Pennsylvania the court refused to consider a teacher's challenge to the district's computation of her seniority rights and its failure to consider her for a vacant position, because the teacher had failed to file a grievance as required by the collective bargaining contract.[47] Similarly, a court in Washington barred a guidance counselor's judicial action because he had failed to exhaust the available grievance arbitration procedure.[48]

The partially and completely converse sides of the exhaustion issue were revealed by cases in Kentucky and Ohio, respectively. In the Kentucky case, an assistant professor sought an injunction against his dismissal until the completion of the processing of his pending grievance. The appellate court ruled that his request for injunction was moot because by the time of his appeal he had completed the grievance procedure.[49] In the Ohio case, the state's highest court held that because there was no dispute as to the provisions of the collective bargaining agreement, its grievance arbitration procedures need not be exhausted; rather the plaintiff-teachers could proceed with claims in court based on alleged breach of their individual contracts.[50]

A New York case illustrated the issue of procedural arbitrability. In this case the school district argued that arbitration should be stayed because the union had failed to abide by the collective bargaining contract requirement that a grievance be submitted in writing and an attempt made to resolve it informally before going to arbitration. The appellate court ruled that matters concerning the step-by-step grievance process were matters of procedural arbitrability which should be resolved by an arbitrator.[51]

The procedural requirements of state labor boards were exemplified by a Michigan case, in which the state's supreme court reversed the decision of the Michigan Employment Relations Commission to dismiss

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46. Board of Educ. v. Rockford Educ. Ass'n, 501 N.E.2d 338 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 725 (Ill. 1987).
47. Clapsaddle v. Bethel Park School Dist., 520 A.2d 537 (Pa. Commw. Ct. 1987).
48. Lew v. Seattle School Dist. No. 1, 736 P.2d 690 (Wash. Ct. App. 1987).
49. Ashley v. University of Louisville, 723 S.W.2d 866 (Ky. Ct. App. 1987).
50. Tapo v. Columbus Bd. of Educ., 509 N.E.2d 419 (Ohio 1987).
51. Enlarged City School Dist. v. Troy Teachers' Ass'n, 516 N.Y.S.2d 195 (N.Y. 1987).

the teachers' claim. The court held that while the Commission had the procedural authority to dismiss the claims, the parties must first be afforded an opportunity to present oral arguments on the sufficiency of their claims.[52]

In the concluding case in this section New York's highest court was faced with determining whether a teacher had the right, under the contractual grievance procedure, to proceed to arbitration without the union's concurrence.[53] The court held that the employee could not individually resort to arbitration, because the union, as the party to the contract, controlled the decision as to whether to arbitrate. The only recourse for the employee would be to bring a DFR suit, a topic covered above under the "Obligations of Exclusive Representatives" section.

Management Prerogatives as a Bar

Certain topics are barred from negotiation or arbitration because they lie within the exclusive discretion of management. Three Illinois cases are illustrative. In the first Illinois case the discretionary appointment of teachers was determined to be a power exclusively vested in the school board and, therefore, nondelegable and nonarbitrable through collective bargaining.[54] In the second case the decision to rehire or dismiss a nontenured teacher was determined to be nonarbitrable because it was a nondelegable power of the community college board.[55] In the third Illinois example the appellate court held that the determination and evaluation of individual teacher qualifications and of seniority were exempt from arbitration because they required the school board's educational expertise and could not be delegated.[56]

Similarly, continuing its management-bar tradition, a New York appellate court vacated an arbitrator's award which interfered with the school district's nondelegable responsibility to determine the qualifications for each position and which teachers best met those qualifications.[57]

On the other hand, the Washington Supreme Court upheld an arbitrator's decision that transferred two teachers from part-time to

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52. Smith v. Lansing School Dist., 406 N.W.2d 825 (Mich. 1987).

53. Board of Educ. v. Ambach, 522 N.Y.S.2d 831 (N.Y. 1987).

54. Board of Educ. v. Rockford Educ. Ass'n, 501 N.E.2d 338 (Ill. App. Ct. 1986). See *supra* text accompanying note 46 for a discussion of another issue in this case.

55. Board of Trustees v. Federation of College Clerical and Technical Personnel, 505 N.E.2d 1284 (Ill. App. Ct. 1987), *appeal denied*, 511 N.E.2d 425 (Ill. 1987).

56. Proviso Council of West Suburban Teachers' Union v. Board of Educ., 513 N.E.2d 998 (Ill. App. Ct. 1987).

57. Three Village Teachers' Ass'n v. Three Village Cent. School Dist., 512 N.Y.S.2d 878 (App. Div. 1987), *appeal denied*, 521 N.Y.S.2d 224 (N.Y. 1987).

full-time positions, ruling that the provision that permitted such a transfer was valid and did not constitute an unlawful delegation of the school board's authority.[58]

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. Arbitrators' decisions are generally accorded judicial deference; the award is typically upheld by the courts as long as it draws its essence from the collective bargaining agreement.[59] This deference extends to the arbitrator's remedy. For example, in a Pennsylvania case former teachers at a state facility for the mentally retarded sought enforcement of a 1984 arbitrator's decision that ordered backpay for fifty-six furloughed employees. The court subsequently affirmed that order in 1985, but the employer later created a subclass of four employees whose work facility had been closed in 1981, refusing to pay them backpay extending earlier than the 1981 closing. The court found that the attempt to create a subclass after arbitration came as an afterthought and ruled that the employer had waived the issue by not previously raising it. Thus, the arbitrator's remedial order was upheld in its entirety.[60]

However, judicial deference to arbitrators' awards does not extend to questions of external law. For example, Pennsylvania's intermediate appellate court held that an arbitrator exceeded his authority in ordering realignment of school personnel in response to teachers' grievance, because his award, which was otherwise entitled to great deference, was not in accord with well established case law.[61] As another example, Maryland's highest court vacated an arbitrator's award, finding it to be based on a palpable mistake of law.[62]

Similarly, a New Jersey appellate court ruled that while an arbitrator's award is entitled to a presumption of validity, in this case the arbitrator's decision exceeded the scope of his power because it was based on a mistake of law.[63]

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58. Lake Washington School Dist. No. 414 v. Lake Washington Educ. Ass'n, 745 P.2d 504 (Wash. 1987).

59. For several examples, see the "Propriety of Arbitral Awards" section *infra*.

60. Commonwealth v. State Schools & Hospital Fed'n of Teachers, 535 A.2d 220 (Pa. Commw. Ct. 1987). For less successful arbitrators' remedies, see the "Propriety of Arbitral Awards" section *infra*.

61. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 521 A.2d 965 (Pa. Commw. Ct. 1985).

62. Board of Educ. v. Prince George's County Educators Ass'n, 522 A.2d 931 (Md. 1987).

63. Jersey City Educ. Ass'n, Inc. v. Board of Educ., 527 A.2d 84 (N.J. Super. Ct. App. Div. 1987).

Another constraint related to external law is public policy. For example, a Michigan appellate court upheld an arbitrator's decision, disagreeing with the trial court's ruling that the public policy against the use of narcotics justified vacating an arbitrator's award that returned an associate professor to his position after he allegedly had smoked marijuana with his students.[64] The appeals court determined that the arbitrator's award was not contrary to public policy; thus, the award stood.

Other 1987 cases concerned the review of labor board decisions. The first such case in this category concerns the review of a labor board decision that in turn reviewed an arbitration board's award. In this case New Hampshire's highest court ruled that the state's labor relations board committed error of law by applying principles of nonreviewability to the arbitrators' award and by upholding the arbitrators' misallocation of the burden of proof.[65]

In a second case in this category, the Washington Supreme Court clarified the dual review standard applicable to cases presenting mixed questions of fact and law under that state's unfair labor practice statute: the factual component is reviewed under the "clearly erroneous" standard, and the legal component is reviewed under the "error of law" standard. Under this dual standard, the court upheld the higher education labor board's various orders in this case, except the one relating to the union's request for attorney's fees on appeal.[66]

In a third case in this category, South Dakota's supreme court ruled that in unfair labor practice cases the trial court should not pass upon issues of fact and conclusions of law that had not first been decided by the state department of labor, unless there was a statute to the contrary.[67] The court remanded the case to the deputy director of the department of labor to determine if an unfair labor practice had been committed and if the teachers were entitled to additional compensation for extra work.

In another case involving the decision of a labor board, an Illinois appellate court upheld the decision of the Illinois Educational Labor Relations Board that a school district had not committed an unfair labor practice in hiring an independent contractor to perform custodial work, finding the decision to meet the standard of being "not contrary to the manifest weight of the evidence."[68]

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64. Lansing Community College v. Lansing Community College Chapter, Michigan Ass'n for Higher Educ., 409 N.W.2d 823 (Mich. Ct. App. 1987).

65. *In re* Board of Trustees of Univ. Sys., 531 A.2d 315 (N.H. 1987).

66. Green River Community College v. Higher Educ. Personnel Bd., 730 P.2d 653 (Wash. 1987).

67. Meade Educ. Ass'n v. Meade School Dist., 399 N.W.2d 885 (S.D. 1987).

68. Service Employees Int'l Local Union No. 316 v. Illinois Labor Relations Bd., 505 N.E.2d 418 (Ill. App. Ct. 1987).

The final case of this section concerned the review sought by teachers in Rhode Island of a state commissioner of education's decision that had also been confirmed by the state board of regents, reinstating the teachers with full back pay minus the amount of unemployment compensation that they received. The state's supreme court upheld the deduction, because it appropriately avoided giving the teachers a "double recovery."[69] Using a review standard borrowed from the arbitral arena, the court concluded that the commissioner committed no error of law.

Propriety of Arbitral Awards and Agency Decisions

Overlapping with the preceding "Standard of Review" section, many court decisions were rendered in 1987 which dealt with the propriety of arbitration and administrative agency decisions. In the majority of the cases the arbitral awards were upheld. The Pennsylvania cases illustrated the application of the traditional deferential standard whereby the arbitrators' awards are upheld if they are found to be drawn from the "essence" of the collective bargaining agreement. One such example involved an arbitrator's inclusion of full-time long-term substitute teachers in the teacher bargaining unit.[70] Another involved an arbitrator's decision to reverse the discharge of a custodian based on his finding that the custodian had never misrepresented his medical condition.[71] In both instances the court found that the arbitrators' decisions were rationally derived from the "essence" of the collective bargaining agreement.

In a Massachusetts case reminiscent of the aforementioned "Management Prerogatives" section, an arbitrator had ordered a teacher reinstated. The school district argued that the arbitrator exceeded his authority, but the court affirmed the arbitrator's award, finding that he had carefully restricted his decision to procedural violations of the evaluation process rather than substantively reviewing the teacher's right to continued employment.[72]

In another termination case, an arbitrator had ruled against the teacher, finding that she had failed to perform satisfactorily and that her removal was proper. The court upheld the arbitrator's award under the federal statute applicable to Department of Defense Dependent

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69. Zuromski v. Providence School Comm., 520 A.2d 137 (R.I. 1987).

70. West Shore School Dist. v. West Shore Educ. Ass'n, 519 A.2d 552 (Pa. Commw. Ct. 1986).

71. Minersville Area School Dist. v. Minersville Area School Serv. Personnel Ass'n, 518 A.2d 874 (Pa. Commw. Ct. 1986), *appeal denied*, 533 A.2d 715 (Pa. 1987).

72. School Comm. v. Norton Teachers' Ass'n, 505 N.E.2d 531 (Mass. Ct. App. 1987), *review denied*, 507 N.E.2d 1056 (Mass. 1987).

Schools, finding the award to be neither arbitrary, capricious, nor contrary to the law.[73]

In three New York cases, arbitrators' awards were also upheld. In the first of these cases an arbitrator had ordered the reinstatement of two tenured teachers who had been disciplined for allegedly using excessive force on students. The court held that the arbitrator had properly denied a motion to reopen the proceeding for the introduction of new evidence, because the school district had already received and declined the opportunity to introduce the evidence earlier.[74] In the second case the court affirmed an arbitrator's award adverse to the grievant-teacher, finding that the decision was not irrational, did not violate public policy, and did not exceed a specifically enumerated limitation on the arbitrator's power.[75] In the final New York case affirming an arbitrator's award, a teacher argued that the arbitrator committed a procedural error in taking too long to reach his decision. The court disagreed, because not only had the parties consented to the extension, but the teacher had also failed to make timely objection to the delay.[76]

In other cases, however, arbitrators' awards were overturned. In one such case the Wisconsin Supreme Court vacated an arbitrator's award because the arbitrator failed to inform the school district that he had previously worked for the teachers' union.[77] The court held that such disclosure was required and that failure to do so constituted evident partiality. Other judicially vacated awards are identified in the preceding "Standard of Review" section.

Other cases represented limitations on arbitrators' remedies. In one such case, a New York appellate court remitted a case back to an arbitrator to modify his award which had ordered a school board to cease combined grade classes.[78] The court noted that only procedural prerequisites for changes relating to salaries and conditions of employment were contractually arbitrable; thus, the arbitrator could compel the parties to consult and negotiate on those matters, but he could not order the school district to discontinue the combined grade classes.

Another appellate court made a similar decision in a Massachusetts case. The arbitrator had ordered teachers reinstated to former positions.

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73. Rogers v. Department of Defense Dependents Schools, 814 F.2d 1549 (Fed. Cir. 1987).

74. Susquehanna Valley Teachers Ass'n v. Board of Educ., 511 N.Y.S.2d 164 (App. Div. 1987).

75. Crowley v. Board of Educ., 513 N.Y.S.2d 792 (App. Div. 1987). Inexplicably, the court appeared to allow for the arbitrator to misconstrue the applicable external law, which runs counter to the cases in the "Standard of Review" section *supra*.

76. *In re* United Fed'n of Teachers, Local 11, 522 N.Y.S.2d 572 (App. Div. 1987).

77. School Dist. v. Northwest United Educators, 401 N.W.2d 578 (Wis. 1987).

78. Board of Educ. v. Yonkers Fed'n of Teachers, 514 N.Y.S.2d 465 (App. Div. 1987).

The court ruled that the arbitrator had exceeded his authority in ordering the reinstatement, because that was a nondelegable duty of the school committee.[79] The case was remanded back to the arbitrator to determine what other remedy, if any, would be proper.

In the final case in this subsection, an arbitrator in Indiana had awarded certain teachers a 10% bonus. The court vacated the award, holding that the provision in the collective bargaining contract that authorized an arbitrator to fashion any remedy he felt appropriate was contrary to state law.[80]

Just as for arbitration awards, the majority of labor board decisions were judicially sustained. For example, the Michigan Court of Appeals upheld the decision of the Michigan Employment Relations Commission that had ruled that a school district's unilateral increase in the number of class periods taught per day constituted an unfair labor practice.[81]

Likewise, in Oregon the appellate court upheld the Employment Relation Board's (ERB) decision that a school district committed an unfair labor practice when it refused to reduce to writing an agreement that was recommended by a fact finder and that was accepted by the school district's negotiating team. Reflecting the aforementioned deferential standard, the court admitted that the school district's view was not necessarily erroneous but affirmed the ERB's decision, because its findings were supported by substantial evidence and its conclusions were not irrational.[82]

The same court upheld the Oregon ERB's decision that an unfair labor practice had been committed by the school district in dismissing a secretary. The court affirmed ERB's finding that the secretary's behavior, in leaving the school one hour early to ride on the band bus, did not amount to flagrant misconduct, because the agency's opinion was a carefully reasoned evaluation of the parties' agreement and of the evidence.[83]

A Pennsylvania case shows that arbitral award can in some circumstances be reviewed under an administrative agency's unfair labor practice jurisdiction and that the agency need not adopt the recommended decision of its hearing examiner. After the union won in arbitration, the defendant-

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79. School Comm. v. Boston Teachers' Union, Local 66, 514 N.E.2d 679 (Mass. Ct. App. 1987).

80. Gary Teachers Union Local No. 4 v. Gary Community School Corp., 512 N.E.2d 205 (Ind. Ct. App. 1987).

81. Kent County Educ. Ass'n v. Cedar Springs Pub. Schools, 403 N.W.2d 494 (Mich. Ct. App. 1987).

82. Cascade Bargaining Council v. Jefferson County School Dist. No. 509-J, 732 P.2d 54 (Or. Ct. App. 1987).

83. Oregon School Employees Ass'n v. Pendleton School Dist. 16R, 735 P.2d 204 (Or. Ct. App. 1987), *review denied*, 742 P.2d 1186 (Or. 1987).

college paid the aggrieved employee at the lower of two rates specified in the collective bargaining agreement. The union then filed an unfair labor practice charge with the Pennsylvania Labor Relations Board (PLRB), and the PLRB hearing examiner ruled that the college had complied with the arbitrator's award, but the PLRB reversed his ruling, ordering the college to pay the grievants at the higher rate specified in the collective bargaining agreement. The appellate court affirmed, finding the board's findings to be supported by substantial evidence and its conclusions not to be capricious, arbitrary, or illegal.[84]

Similarly, New York's appellate court upheld decisions of that state's PERB. In one such case, the court upheld PERB's dismissal of the teachers' claim that the school district had changed their health insurance program in violation of past practice.[85] The court reasoned that while past practice included the provision of a health insurance benefit, it did not prescribe any specific program. In another such case, the same court affirmed PERB's dismissal of community college employees' claim that a reduction in their work assignment was an illegal retaliation for their complaining about the condition of employment of other employees. New York's PERB interpreted the collective bargaining statute to cover only those employees seeking to form or being represented by a union; in this case the teachers were not seeking to organize, but had merely met informally to discuss the conditions of their employment. Finding this conclusion to have a rational basis, the court affirmed; the case is currently on appeal to the state's highest court.[86]

Two cases represented the middle road between judicial affirmances and reverals of labor board decisions, instead being remands for further findings and proceedings. In one such case, an appellate court remanded a case back to California's PERB to determine whether the employer could legitimately refuse to reclassify a secretary on the basis of her union activity. While her union activity was protected conduct, the issue remanded to the PERB was whether the school district could discriminate against her for participating in that protected activity, when she later sought reclassification as a "confidential secretary."[87] In the second such case, a Florida court similarly remanded a case back to the Public Employment Relations Commission (PERC) to determine whether a principal's decision to reprimand a cafeteria worker was motivated by the employee's

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84. State Sys. of Higher Educ. v. Pennsylvania Labor Relations Bd., 528 A.2d 278 (Pa. Commw. Ct. 1987).

85. Unatego Nonteaching Ass'n v. New York State Pub. Employment Relations Bd., 522 N.W.2d 995 (App. Div. 1987).

86. Rosen v. Public Employment Relations Bd., 510 N.Y.2d 180 (App. Div. 1986), *appeal granted*, 513 N.E.2d 1309 (N.Y. 1987).

87. McPherson v. Public Employment Relations Bd., 234 Cal. Rptr. 428 (Ct. App. 1987), *review denied*, 189 Cal. App.3d 293 (Cal. 1987).

past reports of school health and safety violations, which was protected conduct.[88] The PERC had used the improper standard that antiunion motivation was necessary to find that the employer had committed an unfair labor practice.

In three cases, one each in Florida, Pennsylvania, and Illinois, the courts overturned labor board decisions. In the Florida case the court found that the PERC had exceeded its statutory authority in ordering that a school board give a union access to a bulletin board.[89] Also finding that the PERC order was too vague and overbroad regarding distribution of union material on school premises, the court laid out specific guidelines regarding when and where solicitation was permitted. In the Pennsylvania case, the appellate court reversed a PLRB order that allowed the employer to deduct unemployment compensation benefits from back wages after an employee was reinstated.[90] In the Illinois case, the appellate court reversed the Educational Labor Relations Board's order that a school district provide the union almost unqualified discovery on matters that transpired during closed session strategy sessions of the board regarding a strike and negotiations.[91] Disagreeing with the ELRB, the court held that the school board had properly asserted a qualified privilege regarding the closed session strategy sessions.

Statute-based Claims

Interpretation of Collective Bargaining Legislation. In general, courts, rather than arbitrators or labor boards, are the ultimate arbiters as to the meaning of collective bargaining and related statutes. In Texas, for example, the court of appeals held that while the state statute, which is far from a full collective bargaining act, gave public employees the right to present grievances, it did not give the representative any claim for damages against an individual or agency who retaliated against that representative.[92]

In Iowa the state supreme court interpreted the state's Public Employment Relations Act to include some substitute teachers.[93] More specifically, the court interpreted the Act's four-month inclusion require-

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88. School Bd. v. Lee County School Bd. Employees Local 780, 512 So. 2d 238 (Fla. Dist. Ct. App. 1987).

89. School Bd. v. Public Employees Relations Comm'n, 513 So. 2d 1286 (Fla. Dist. Ct. App. 1987).

90. Association of Pa. State College & Univ. Faculties v. Pennsylvania Labor Relations Bd., 532 A.2d 60 (Pa. Commw. Ct. 1987).

91. Illinois Educational Labor Relations Bd. v. Homer Community Consol. School Dist. No. 208, 514 N.E.2d 465 (Ill. App. Ct. 1987).

92. Bagg v. University of Tex. Medical Center, 726 S.W.2d 582 (Tex. Ct. App. 1987).

93. Iowa Ass'n of School Bds. v. Iowa Pub. Employment Relations Bd., 400 N.W.2d 571 (Iowa 1987).

ment to mean that if an employee was employed for any service during each month for four consecutive months, he would be eligible for coverage under the Act.

In a jurisdictional case currently on appeal to the state's highest court, an Illinois appellate court interpreted the state's labor relations act to require that disputes between teachers and their unions that arose from the filing of grievances had to be contested to the state Educational Labor Relations Board, with appeal to the Illinois appellate court.[94] The school district's bypassing of the ELRB to the circuit court, therefore, had been improper because the circuit court lacked jurisdiction.

Finally, the Supreme Court of Connecticut interpreted a state collective bargaining statute that provided for mediation and arbitration to apply only to the process of bargaining for a new contract, not to resolve disputes during the term of an existing contract.[95]

Interrelationship with Other Laws

Litigants sometimes challenge rights or procedures under collective contracts or statutes because they appear to conflict with those under other applicable laws. Several cases in 1987 fell in that category. In two cases the applicable laws were city charters. In one of these cases, a proposed San Francisco city charter provision required voter approval of any modification, deletion, or addition of city employee benefits. Several teacher organizations claimed that the provision would conflict with the state's meet-and-confer statute. The court disagreed, finding instead that the city's duty to meet and confer on employee benefits was in no way infringed upon by a city charter provision that would allow the electorate to vote on employee fringe benefits.[96]

In the second such case, a school board in Connecticut challenged the State Board of Labor Relations' decision that the district had committed a "refusal to bargain," which was a prohibited labor practice. Having determined that the city charter required that certain collective bargaining contract provisions be submitted to the city council for approval, the school district submitted the contract in its entirety after ratification to the city council, resulting in several contractual revisions. The state's highest court ruled that since the contract in question had not only been ratified and implemented but also had expired, the issue was moot.[97]

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94. Board of Educ. v. Compton, 510 N.E.2d 508 (Ill. App. Ct. 1987), *appeal granted*, 545 N.E.2d 101 (Ill. 1987).

95. Hartford Principals' and Supervisors' Ass'n v. Shedd, 522 A.2d 264 (Conn. 1987).

96. United Pub. Employees, Local 390/400 v. San Francisco, 235 Cal. Rptr. 477 (Ct. App. 1987).

97. Board of Educ. v. Connecticut Bd. of Labor Relations, 530 A.2d 588 (Conn. 1987).

In other cases the applicable laws were federal statutes. One such case involved a title VII sex discrimination claim against a board of education in Illinois. The board moved to dismiss the federal court suit because in a separate action the Illinois Supreme Court had already ruled on the matter, holding that the arbitrator was without authority to award the plaintiff-teachers' reinstatement. The Seventh Circuit Court of Appeals held that the state court action was *res judicata* on the federal title VII claim, because the state court's judgment was based on the arbitrator's lack of jurisdiction, not on the merits of the case.[98]

Similarly, in another federal case in Illinois, the United States district court ruled invalid a provision in a collective bargaining contract which provided that the employer could terminate a grievance if the employee sought resolution in another forum.[99] In this case the employee filed an EEOC complaint based on age discrimination. Since the union and the employees could not waive the employee's title VII rights, the employees' grievance under the collective bargaining contract could not be dismissed.

In a final federal case, a group of female bus drivers filed a title VII sex discrimination suit against a school district that had assigned bus drivers with less seniority, contrary to the collective bargaining agreement, to routes to which the women felt entitled. The routes in question served residents of a village of Hasidic Jews who sent their male children to a private males-only religious school. When the male students refused to board the bus driven by women, the school district attempted to accommodate their religious beliefs by reassigning the drivers. After pursuing the matter to arbitration, the female bus drivers attempted to pursue the discrimination claim in court. They succeeded in having the claim heard; the federal district court ruled that while the arbitrator's findings might be considered as evidence, the findings had no issue or claim preclusion effect on the title VII sex discrimination action.[100]

In other cases the applicable laws were state statutes governing termination for cause or for economic reasons. In Oregon the question was whether a discharged teacher's claim was governed by the state fair dismissal law or the state public employee collective bargaining act. The state appellate court ruled that since the grievance filed in the case actually was directed at the school district's compliance with the collective bargaining agreement, the collective bargaining statute applied.[101]

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98. Kirk v. Board of Educ., 811 F.2d 347 (7th Cir. 1987).

99. EEOC v. Board of Governors of State Colleges and Univs., 665 F. Supp. 630 (N.D. Ill. 1987).

100. Bollenbach v. Monroe-Woodbury Cent. School Dist., 659 F. Supp. 1450 (S.D.N.Y. 1987).

101. Luoto v. Long Creek School Dist., 747 P.2d 370 (Or. Ct. App. 1987).

In a somewhat similar case a teacher in Illinois had been dismissed under a collective bargaining provision that specified procedures for reduction-in-force (RIF). An alternative statute in the state school code provided different procedures for terminations for incompetence. The appellate court found that the real reason for the dismissal was incompetence; thus, the teacher had been improperly discharged without the alternative statute's requirements of due process, including a warning, opportunity to remedy deficiencies, and a hearing.[102]

In another such situation, a teacher in Florida appealed a circuit court decision to send his termination case to arbitration. The teacher contended that this decision conflicted with a separate section of the Florida code that allowed dismissals to be appealed to the district court of appeal. The appellate court ruled that the collective bargaining agreement appropriately provided for arbitration as an alternative to the statutory appeal process and, thus, that the case was properly sent to arbitration for a decision.[103]

Two Illinois cases presented other state statutory interrelationship issues. In one of these cases, the state legislature passed a statute requiring school nurses hired on or after July 1, 1976 to be certified, but allowing those with bachelor's degrees who were already employed to continue working without certification. The plaintiff was employed as a school nurse on said date, but she did not complete her bachelor's degree until the following year. Later, because of a reduction-in-force, the plaintiff was reduced from a five-day to a three-day work week, while a certified nurse with fewer years of experience remained as a full-time employee. The plaintiff claimed that this action breached the collective bargaining agreement. However, the appellate court ruled that the school district had properly assessed the plaintiff's experience, giving her seniority credit only for those years after she had obtained certification.[104]

In the other Illinois case, the same court was faced with determining seniority and "bumping" rights when teachers were involved in a RIF. After reviewing the Community College Tenure Act, the Education Labor Relations Act, and the collective bargaining agreement, the court held that the faculty members had seniority rights only over other tenured employees, rather than part-time instructors, and that the

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102. Schafer v. Arlington Heights Board of Educ., 510 N.E.2d 1186 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E.2d 126 (Ill. 1987).

103. DeSoto County Teachers Ass'n v. District School Bd., 502 So. 2d 928 (Fla. Dist. Ct. App. 1987), *review denied*, 511 So. 2d 298 (Fla. 1987).

104. Verdeyen v. Board of Educ., 501 N.E.2d 937 (Ill. App. Ct. 1987), *appeal denied*, 508 N.E.2d 737 (Ill. 1987).

"bumping" rights referred to positions rather than to courses.[105]

Similarly, teachers in Michigan contended that their layoffs violated the state's teachers' tenure act. However, the appellate court ruled that neither the layoffs nor the collective bargaining agreement, under which the layoffs and early retirements had been negotiated, violated the tenure act.[106]

In another RIF case, a Minnesota appeals court allowed and affirmed a breach of contract action, finding that the teacher had accrued and retained seniority rights because of a grandfather clause in the collective bargaining agreement that rendered defective his layoff under the state's RIF statute.[107] Conversely, an Iowa appeals court ruled that a school district complied not only with applicable state law but also with the collective bargaining agreement in RIFfing one of its teachers.[108]

Other cases concerned state statutory interrelationship issues relating to employer actions other than termination. In one such case, a group of teachers in Washington brought an action alleging that their school district's use of supplemental contracts violated the state's continuing statute. The court agreed, ruling that the teachers did not waive their rights to contest the supplemental contracts by agreeing to them in their collective bargaining agreement and that the school district could not divide teachers' contracts under basic and supplemental rubrics in order to defeat the state's continuing contract statute.[109]

In Oregon several state statutes were at issue when an education association sought to have a collective bargaining agreement reduced to writing and enforced. After two board members had informed him that they agreed with contract provisions, their spokesperson drafted a proposal that was accepted by the association. The appellate court ruled that the contract was valid, even though one state statute required approval of contracts by the board at a regular or special meeting and another statute required that governing bodies meet in public.[110] Noting that the school board could have complied with the statutes by ratifying the agreement in public, the court ruled that the district was bound by the contract.

In California, a teacher brought suit against a school board because

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105. Biggiam v. Board of Trustees, 506 N.E.2d 1011 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E.2d 101 (Ill. 1987).

106. Board of Educ. v. Brisbois, 417 N.W.2d 84 (Mich. Ct. App. 1987).

107. Jenson v. Joint Indep. School Dist., 408 N.W.2d 203 (Minn. Ct. App. 1987).

108. Pocahantas Community School Dist. v. Levene, 409 N.W.2d 698 (Iowa Ct. App. 1987).

109. Kelso Educ. Ass'n v. Kelso School Dist. No. 453, 740 P.2d 889 (Wash. Ct. App. 1987).

110. South Benton Educ. Ass'n v. Monroe Union High School Dist. No. 1, 732 P.2d 58 (Or. Ct. App. 1987), *review denied*, 736 P.2d 565 (Or. 1987).

he felt that his salary classification, which was part of the collective bargaining agreement, violated the salary scale in the state's education code. Ruling in favor of dismissal, the appellate court held that an incorrect placement on the salary scale would be an unfair labor practice, which fell within the exclusive jurisdiction of the Public Employment Relations Board.[111] Thus, the teacher was required to exhaust his administrative remedies prior to pursuing the matter in court.

Reaching a different result, the First Circuit Court of Appeals ruled that an employee's lawsuit over his termination was a straight breach of contract action and, therefore, that the employee was not required to exhaust his administrative remedies provided in the collective bargaining contract.[112] For the same reason, the court held that suit was not barred by the statute of limitations for collective bargaining claims. Nevertheless, rather than reinstatement and backpay, the teacher was awarded $6,000 in actual damages as a "make-whole" remedy.

Similarly separating collective bargaining and other rights, a California appeals court granted a writ of mandamus to San Francisco teachers who sought reclassification under a salary schedule that had been provided in a collective bargaining agreement, ruling that said salary schedule did not comply with the state education code.[113]

In the final case in this section, a board of education appealed a decision by New York's Unemployment Insurance Appeal Board (UIAB) which had granted unemployment benefits to a former janitor. Rejecting the school board's contention that the UIAB was bound by an arbitrator's decision that the janitor had been dismissed for just cause, New York's highest court concluded that the UIAB was required to give collateral estoppel effect to the arbitrator's findings regarding the claimant's insubordination but was free to make its own independent conclusion as to whether the insubordination constituted misconduct justifying a denial of unemployment benefits.[114]

Rights on Expiration of Contracts

Occasionally lawsuits are brought addressing the effects of a collective bargaining contract after its expiration date. In two cases in 1987, legal obligations were held to survive the contract's expiration. In the first case, following the weight of authority in other jurisdictions, an appellate court in Illinois held that annual salary increases were "status

111. McCammon v. Los Angeles Unified School Dist., 241 Cal. Rptr. 1 (Ct. App. 1987).

112. Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 822 F.2d 188 (1st Cir. 1987).

113. San Francisco Teachers' Ass'n v. San Francisco Unified School Dist., 242 Cal. Rptr. 352 (Ct. App. 1987).

114. *In re* Guimarales, 510 N.Y.S.2d 588 (N.Y. 1986).

quo" and, thus, that the district was required to implement the increases while negotiations for a new contract were pending.[115] In the second case, an appellate court in Pennsylvania ruled that a school district's refusal to honor the arbitration provisions of a contract after its expiration was an unfair labor practice, because, in the court's view, the parties had agreed to extend the contract agreement during the hiatus between contracts.[116]

However, in another case, an appellate court in Ohio took the opposing view, ruling that the school district had no duty under the state's collective bargaining act to continue deducting union dues and fair-share fees after the collective bargaining contract had expired.[117]

In the final case in this category, a New York appellate court, in effect, ducked the issue. When a community college faculty challenged the PERB's decision upholding the college's refusal to implement salary increments after a collective bargaining agreement had expired, the court found that the subsequent contract, which applied retroactively to the expiration of the previous agreement, rendered the issue moot.[118]

CONCERTED ACTIVITY

Several cases in 1987 concerned issues arising from school strikes. In a Louisiana case, a school district had deducted strike days in compiling seniority lists for implementation of a RIF. The appellate court remanded the case to the trial court to determine whether some of the teachers would have been laid off, regardless of their inappropriate placement on the seniority lists, because of the work stoppage.[119]

Alleged strike misconduct gave rise to a Vermont case in which the state's highest court upheld a Labor Relations Board (LRB) decision to not issue unfair labor practice charges against both the school board and the teachers' association.[120] The court ruled that the LRB did not abuse its discretion in holding that the proper forum for determining misconduct of striking teachers would be a compliance proceeding.

Other cases concerned school employees' right to strike in various jurisdictions. In Massachusetts the appeals court upheld the Labor Rela-

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115. Vienna School Dist. No. 55 v. Illinois Labor Relations Bd., 515 N.E.2d 476 (Ill. App. Ct. 1987).

116. Greater Nanticoke Area School Dist. v. Area Educ. Ass'n, 520 A.2d 955 (Pa. Commw. Ct. 1987).

117. Ohio Ass'n of Pub. School Employees v. New Miami Local School Dist. Bd. of Educ., 509 N.E.2d 973 (Ohio Ct. App. 1986).

118. Faculty Ass'n of Suffolk Community College v. Public Employment Relations Bd., 506 N.Y.S.2d 591 (App. Div. 1986).

119. St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Board, 503 So. 2d 69 (La. Ct. App. 1987).

120. Hinesburg School Dist. v. Vermont NEA, 522 A.2d 222 (Vt. 1986).

tions Commission's dismissal of a petition regarding a bus drivers' strike, ruling that the commission rightfully had found that the bus drivers were independent contractors and, as such, did not fall within the statutory prohibition against public employee strikes.[121]

Similarly, a school district in Pennsylvania was unsuccessful in its attempted injunction against the teachers' "selective strikes." The state's intermediate appellate court held that the selective strikes could only be enjoined under the state's public employee bargaining act if they created a "clear and present danger or threat to the health, safety, and welfare of the public."[122] The court concluded that a total loss of two hours and ten minutes did not create such a danger and, thus, reversed the trial court's order for an injunction. In a footnote the court rejected, "under these facts, the [d]istrict's argument that the strike violated the right to education guaranteed to all handicapped children under . . . the Education of the Handicapped Act."[123]

Similarly, a Minnesota appeals court reversed a lower court order for a temporary injunction against a teachers' association, ruling that the public school teachers' right to strike matured after the teachers' contract had expired and they had mediated for thirty days rather than when the teachers actually filed a notice of their intent to strike.[124]

MISCELLANEOUS DECISIONS

Various cases presented issues that did not fall within the foregoing sections of this year's Bargaining chapter. The first such case was a remand in *Chicago Teachers Union, Local No. 1 v. Hudson*[125] from the Supreme Court to the federal district court for a determination of the appropriate remedy. As one step in this remanded proceeding, the district court denied the plaintiff's motion for a certification of the class of nonunion members to receive monetary relief.[126]

Two of the miscellaneous cases involved attorneys or attorney fees. In one case the plaintiff teachers moved to disqualify a law firm representing the school board because one member of the firm had been the board's chief negotiator for the collective bargaining agreements under which the teachers sued for breach of contract and fraud. The appellate court affirmed the trial court's disqualification of the law firm, because

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121. School Comm. v. Labor Relations Comm'n, 512 N.E.2d 1151 (Mass. Ct. App. 1987).

122. Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 523 A.2d 1183, 1189 (Pa. Commw. Ct. 1987), *appeal denied*, 533 A.2d 715 (Pa. 1987).

123. 523 A.2d at 1187.

124. Central Lakes Educ. Ass'n v. Independent School Dist. No. 743, 411 N.W.2d 875 (Minn. Ct. App. 1987).

125. 106 S. Ct. 1066 (1986).

126. Hudson v. Chicago Teachers' Union, 117 F.R.D. 413 (N.D. Ill. 1987).

it was obvious that the former chief negotiator could be called as a witness in the case, and further, that the disqualification would not work on undue hardship on the board.[127] In the other case, which involved a determination of attorney fees due when an unsuccessful union presidential candidate challenged the election, the federal district court held that attorney fees could be awarded at each stage of litigation in which the union received a common benefit.[128] Accordingly, some of the requested fees were allowed, and others were not.

In Washington a welding instructor sued a college after his dismissal. The appellate court held that the college had adequately complied with the collective bargaining provision requiring an attempt to resolve matters without formal dismissal procedures.[129] Further, the court rejected the employee's claim that he was terminated for exercising his first amendment rights, because it found that the college would have reached the same decision in the absence of constitutionally protected conduct.

In New York, an appellate court upheld a parity clause whereby members of a department chairman's association were entitled to take advantage of a "cash in" benefit contained in the teacher union's agreement with the school district.[130]

In Ohio, an appellate court granted a writ of mandamus to compel a board of education to pay the plaintiff-teacher for accrued, unused sick leave.[131] The board contended that the collective bargaining agreement, which required the conversion of such sick leave into severance pay, prevailed over contrary statutory provisions, but the court held that, at the time, statutory law controlled.

Finally, a Michigan teacher brought a breach of contract action against his school district after he was denied seniority for the years he served as an administrator. The appellate court ruled that the collective bargaining agreement, which was entered into during the time that the teacher had been an administrator and not a member of the bargaining unit, did not supersede his employment contract, which provided that seniority accumulated while one served as an administrator.[132]

CONCLUSION

The numbers of appellate court cases regarding collective bargaining in education reached an all-time high in 1987. The notion that

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127. Hoerger v. Board of Educ., 514 N.Y.S.2d 402 (App. Div. 1987). For a separate proceeding in this litigation, see note 22 and accompanying text.
128. Donovan v. Local 6, Washington Teachers Union, 655 F. Supp. 1 (D.D.C. 1986).
129. Sinnott v. Skagit Valley College, 746 P.2d 1213 (Wash. Ct. App. 1987).
130. Lopez v. Board of Educ., 522 N.Y.S.2d 921 (App. Div. 1987).
131. State *ex rel.* Runyan v. Henry, 516 N.E.2d 1261 (Ohio Ct. App. 1987).
132. Champion v. Kenowa Hills Pub. Schools, 402 N.Y.2d 62 (Mich. Ct. App. 1986).

education employers and their unionized employees will resolve their differences at the bargaining and arbitration tables without resort to the courts remains a distant dream.

Little has changed this year in regard to the substantive and procedural law that applies in such educational bargaining cases. The decisions this year generally applied well established labor law concepts, with variations due largely to factual and jurisdictional differences.